

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SANDRA LaFLEUR,)	
Claimant,)	IC 02-018746
v.)	
)	
K B TOY, INC. dba KAY-BEE TOYS,)	ORDER DENYING
)	RECONSIDERATION
Employer,)	
and)	
)	Filed April 20, 2006
AMERICAN PROTECTION)	
INSURANCE COMPANY,)	
)	
Surety,)	
Defendants.)	
)	

On February 28, 2006, Defendants filed a Motion for Reconsideration of the Industrial Commission's decision of February 17, 2006, in the above referenced case. Claimant filed a Response on March 17, 2006. A response to a motion for reconsideration must be filed within 14 days of the date of filing of the motion. J.R.P. 3(F). Claimant's Response was filed 17 days after the filing of the motion for reconsideration. Therefore, it is untimely and will not be considered. Defendants' filed a Reply Memorandum on March 21, 2006.

Defendants request reconsideration on the issue of apportionment of Claimant's permanent impairment and disability. Defendants argue that apportionment of preexisting conditions should be based on an evaluation of Dr. McNulty and Dr. Adams' opinions that 5 percentage points of PPI to the cervical condition is appropriately attributed to preexisting conditions and that the same ratio

should be applied to Claimant's disability award.

The Commission will first address the issue of apportionment of impairment. The Commission was presented with conflicting evidence and ultimately found that Claimant is entitled to 31% whole person permanent partial impairment from her industrial accident. The decision was based on the opinions of Dr. McNulty, Dr. Olscamp, and Dr. Dirks. Dr. McNulty opined 31% total whole person impairment and related the entire amount of impairment to Claimant's work accident. The Commission reviewed all the medical reports and depositions and found the opinions of the above listed doctors to be the most persuasive. Defendants do not present any additional arguments that cause the Commission to reconsider its original impairment determination.

Next, the Commission will address Defendants' request to apportion some amount of Claimant's disability to preexisting conditions. A separate statute governs the apportionment of disability, Idaho Code § 72-406, and express notice needs to be given to the parties when apportionment of disability is sought.

The final Notice of Hearing, which lists the noticed issues, was filed on June 8, 2005. Conspicuously missing from the noticed list of issues is the issue of disability apportionment under Idaho Code § 72-406. No opposition was made or filed with the Commission after the filing of the Notice of Hearing listing the issues for hearing. Because the issue of disability apportionment was neither noticed nor reserved, it was waived. Additionally, the noticed four issues were specifically listed before opening statements at the hearing on July 29, 2005. At no point during the listing of the issues by the presiding Commissioner did Defendants interject to raise the issue of disability apportionment.

In conclusion, the Commission's determination that the entire amount of impairment related

to Claimant's work accident is supported by substantial evidence in the record. Also, because the issue of apportioning disability was not a noticed issue, it was waived, and is not proper for reconsideration.

Based upon the foregoing reasons, Defendants' Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED this _20th__ day of April, 2006.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman

/s/ James F. Kile, Commissioner

/s/ R. D. Maynard, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on _20_ day of April, 2006, a true and correct copy of the foregoing ORDER DENYING RECONSIDERATION was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD
P.O. Box 1319
Coeur d'Alene, ID 83816-1319

ERIC BAILEY
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____/s/_____